IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. **78-931**

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
Defendant Appellants,
AND
ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor Appellants,

versus

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES CITED

Cases *Page*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

OPINION BELOW

The opinion of the district court is not reported. It is printed in Appendix A.

JURISDICTION

This is an appeal from an order of a three-judge district court entered September 12, 1978, awarding attorneys' fees pursuant to 42 U.S.C. § 1988, because the appellees were the prevailing parties before the district court in *United Farm Workers National Un-*

ion v. Babbitt, 449 F. Supp 449, (D. Ariz.), jurisdiction postponed, 47 U.S.L.W. 3245 (U.S. Oct. 10, 1978) (No. 78-225). The notice of appeal from the attorneys' fee decision was filed October 11, 1978.

This Court has jurisdiction under 28 U.S.C. § 1253. The attorneys' fee issue by itself would not have been within the jurisdiction of the three-judge district court because it did not draw into question nor seek to enjoin a state statute. However, once a three-judge court properly assumes jurisdiction, the jurisdiction of that court and of this Court on appeal extend to every question in the case. *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Philbrook v. Glodgett*, 421 U.S. 707 (1975); *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960) and cases cited in footnote 7 of that opinion. *Cf. Public Service Commission v. Brashear Freight Lines*, 312 U.S. 621 (1940) (three-judge panel no longer had jurisdiction when the only issue was the damages resulting from the prior issuance of a temporary restraining order).

QUESTIONS PRESENTED

The Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. § 1988, allows attorneys' fees to the prevailing party other than the United States, "[i]n any action or proceeding to enforce a provision of [certain designated federal statutes including 42 U.S.C. § 1983]." Section 1983 provides a remedy against anyone who, under color of state law, deprives a person of rights, privileges or immunities secured by the Constitution or laws of the United States. The questions presented by this appeal are:

1. Whether in a section 1983 suit attorneys' fees may be awarded against governmental defendants who have not acted to deprive the plaintiffs of federally secured rights, and whose only relevant conduct has been to fulfill their legal obligation to defend in court the constitutionality of a properly enacted state statute.

2. Whether in a section 1983 suit attorneys' fees may be awarded against nongovernmental intervenors who have not acted under color of state law, who have not deprived anyone of federally guaranteed rights, and who intervened some three years prior to enactment of 42 U.S.C. § 1988.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1988 provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This appeal is taken from a judgment awarding attorneys' fees under 42 U.S.C. § 1988 in *United Farm Workers National Union v. Babbitt*, 449 F.Supp 449 (D. Ariz. 1978), jurisdiction postponed, 47 U.S.L.W. 3245 (U.S. Oct. 10, 1978) (No. 78-225). But for the timing of the district court's orders, the attorneys' fee judgment would have been included in the principal appeal, scheduled for argument in January or February of this term.

The amended complaint in this case (challenging the constitutionality of Arizona's Agricultural Employment Relations Act, A.R.S. §§ 23-1381-95) (Supp. 1978), (AERA) was filed in August of 1973. It named as defendants the Governor of Arizona, the State Attorney General, and members and other officials of the Agricultural Employment Relations Board, the state entity charged with implementation of the AERA. On November 5, 1973, the district court permitted the Arizona Farm Bureau Federation, the Arizona Grape Growers Association, the Vegetable Growers Association, and the Yuma Citrus Shippers' Association to intervene on the side of the defendants. At the time of the intervention there was no statute awarding attorneys' fees in this kind of case. The statute relied on by the district court, 42 U.S.C. § 1988, was not enacted until 1976, some three years after the intervention.

The district court's judgment declaring the AERA unconstitutional was entered April 20, 1978. Eight days later, the appellees filed a Motion for Award of Attorneys Fees pursuant to 42 U.S.C. § 1988. Over the succeeding three and a half months, the attorneys' fee issue was briefed and argued, and some evidence was introduced. The district court acknowledged, and made a good faith effort to comply with, the State's request that if feasible, the attorneys' fee issue be determined in time that it could be included in the appeal of the main case. Through no one's fault, that proved not to be feasible; the jurisdictional statement in the principal case, No. 78-225, was filed August 8, 1978, fifty six days after the filing of the notice of appeal. The order awarding attorneys' fees was entered on September 12. On October 10, 1978 this Court postponed the issue of jurisdiction in No. 78-225, pending briefing and argument on the merits. The appellants' merits brief in No. 78-225 was filed November 24, 1978, and the appellees' brief is due December 26.

The district court's opinion of September 12, dealing with attorneys' fees, starts from the premise (not accepted by appellants) that it is beyond dispute that the state defendants are liable for attorneys' fees, and that the only issue is whether the intervenors are also liable. The court acknowledged (1) that attorneys' fees under section 1988 are limited to actions under designated sections of federal statutes; (2) that section 1983 is the only one of these sections under which this action purported to have been brought and (3) that section 1983 is limited by the "color of state law" requirement. The court nevertheless held the

intervenors liable, on the basis of two alternative theories.

The first theory is that "§ 1983 should not be read to limit § 1988", (App. A-6) and that the color of state law requirement is inapplicable. The opinion points out that section 1988 itself makes no mention of the color of state law requirement, and that sections 1982, 1985, 1986 have no such provision. From these unassailable starting points, the district court concluded that for section 1988 purposes, suits under section 1983 (which has a color of state law limitation) should be treated the same as suits under other sections which do not.

The district court's alternative theory is that "after intervention [the intervenors] became alter egos of the State of Arizona. . . ." (App. A-7). The court correctly characterized the intervenors participation as "a driving force, if not the main force, in the defense of this suit. . . ." (*Id.*)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. **Section 1988 Does Not Authorize an Award of Attorneys' Fees Against Any Defendant, Because No Defendant in This Case Has Acted to Deprive Any Plaintiff of "any rights, privileges, or immunities secured by the Constitution and laws. . . ."** (42 U.S.C. § 1983).

This Court held in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) that in the absence of congressional authorization, federal courts are not to award attorneys' fees on the basis of a private attorney general theory. Accordingly, the

plaintiffs' only possible entitlement to attorneys' fees in this case is under the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988, which provides in pertinent part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The statutory gateway to attorneys' fees under section 1988 is an action under one of the provisions of federal law designated by that section. There is no other way. Unless the case fits within the statutory mold of one of the designated substantive provisions, it necessarily falls outside the scope of section 1988, and under the general principle of *Alyeska* that there is no non-statutory right to attorneys' fees.

The only designated section under which this suit purports to have been brought is section 1983. The dispositive issue, therefore, is whether the conduct of any defendant fits within the section 1983 prohibition against "deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." of the United States.

There is no defendant—governmental or intervenor—whose conduct fits this description. While several governmental officials have been named as defendants, the responsibility of defending constitutionality has rested on the Attorney General. Like the Attorney General of the United States, and like his counterparts in other states, Arizona's Attorney General is charged with the responsibility of defending the

statutes of his state that are attacked in court.[1] Since the only issue in this case is the constitutionality of the statute, and since the defense of the constitutionality of state statutes falls on the Attorney General, the involvement of the other governmental defendants has been nominal.

Where, then, is the deprivation by any defendant in this case of rights guaranteed by the Constitution and laws of the United States? The complaint is not directed toward any specific act of any defendant in violation of federal rights. Neither did the district court determine that there had been any such violation. Rather, the deprivation of constitutional right of which the plaintiffs complained and the district court found resulted from the very existence of the statute, and the court's views concerning how it might be applied. The district court held five sections unconstitutional, three on their face and two "in light of the evidence." The two sections invalidated "in light of the evidence" were A.R.S. § 23-1385, dealing with union access to employer facilities, and A.R.S. § 23-1389, dealing with elections. The "evidence" received as to those two sections was not evidence of any actual enforcement or implementation; it consisted of attempts by expert witnesses to hypothesize how the statute might operate.

Absent from the case, therefore, is evidence of any act by any defendant or any intervenor that can be characterized as depriving any plaintiff of rights guaranteed by the Constitution or laws of the United

[1] See A.R.S. § 12-1841. See also A.R.S. §§ 41-192 and 41-193. Cf. 28 U.S.C. §§ 2403 and 2284(b)(2).

States. The plaintiffs' contention was and is that the statute itself—by its very existence—effected the deprivation. Who is responsible for the statute's existence? Not the Attorney General. Not the Governor, nor the Secretary of State, nor the officials of the Agricultural Labor Board. To the extent that anyone acted to deprive the appellees of federally guaranteed rights by passage of the AERA, the responsible parties are members of the 1972 Arizona Legislature. Even on the assumption that attorneys' fees in this case may be recoverable against someone, they are not recoverable against any of these defendants.

Neither could it be argued that because the intervenors and others urged the passage of the AERA, the intervenors have thereby deprived the appellees of constitutional rights. Absent a "sham"[2] which in this case has neither been alleged nor proven, the involvement of those who urge governmental action is itself protected by the First Amendment. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

There is a remaining question, whether the defense of a lawsuit challenging an allegedly unconstitutional statute can be a deprivation of rights within the meaning of section 1983. Appellants submit that to state that question is to decide it. Section 1983 should not be interpreted to mean that the discharge of one of his

[2] See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972).

foremost official duties inevitably involves not only the Arizona Attorney General, but also the United States Attorney General and all state attorneys general in potential violation of federal law for which attorneys fees may be awarded against them.

There might be some cases in which the conduct of governmental officials related to the passage of a statute and the defense of its constitutionality demonstrates such extreme disregard for constitutional rights that attorneys' fees should be awarded. *Sims v. Amos*, 340 F. Supp. 691 (M.D.Ala.) *aff'd.*, 409 U.S. 942 (1972) is illustrative. *Sims v. Amos* sought attorneys' fees for earlier litigation in which the plaintiffs succeeded in obtaining a declaration that Alabama's legislative apportionment scheme was unconstitutional. Named as defendants in the attorneys' fee suit were state legislators, the Secretary of State, the Attorney General, and the Governor. In awarding attorneys' fees, the district court observed:

> Defendants contend, of course, that the facts in the present suit do not justify the award. They argue primarily that they have not been arbitrary, unreasonable, or obdurately obstinate with regard to reapportionment or with regard to the defense of this lawsuit, and that in the absence of bad faith, a grant of attorneys' fees is unwarranted. As plaintiffs have demonstrated, however, this argument, as it relates to the Legislature, is devoid of any factual basis. The history of the present litigation is replete with instances of the Legislature's neglect of, and even total disregard for, its constitutional obligation to reapportion. Although the legal principles applicable to this case were clear to the Legislature and had often been pointed out and emphasized by this Court in an effort to

> prompt legislative action, and although the 1970 decennial census demonstrated that the Alabama Legislature was egregiously malapportioned, the Legislature unyieldingly refused to perform the mandate imposed upon it by both the State and Federal Constitutions. It is indisputable that the Legislature's deliberate failure to act precipitated and in fact necessitated this litigation. Justice would not be served were that body to escape responsibility for attorneys' fees. 340 F. Supp. at 693-94.

Sims v. Amos is significant for two reasons. First, state legislators—the state officials responsible for the statute's existence—were joined as party defendants. Second, *Sims v. Amos* was a case of blatant disregard for constitutional rights. It is only such extreme cases that would warrant joinder of legislators as defendants, or the award of attorneys' fees where the only alleged deprivation of constitutional rights was effected by the passage of a statute or the defense of its constitutionality. The enactment of a labor statute patterned after the NLRA does not present such an extreme case.[3]

At the very least, whether attorneys' fees under section 1988 may be awarded in a section 1983 suit against state officials who have never acted to deprive the plaintiffs of any constitutional rights and whose

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[3] Cf. *Christianburg Garment Co. v. EEOC*, 98 S. Ct. 694 (1978), where this court held that the prevailing defendants in Title VII suits could be awarded attorneys' fees only if the plaintiff's action in bringing suit was frivolous, unreasonable, or without foundation.

only relevant conduct has been to defend the constitutionality of a state statute, presents a federal question that is substantial.

2. **Even If This Were a Section 1983 Suit So That Attorneys' Fees Could Be Awarded Against State Officials, It Would Still Be Improper to Award Them Against the Intervenors, Who Entered the Litigation Voluntarily, and Who Do Not Fit the Section 1983 "color of state law" Requirement.**

In its narrow perspective, this second argument assists only the intervenors. It is presented in this jurisdictional statement by all appellants, because the district court's holding places in jeopardy interests of the State of Arizona (and other states as well) far more important than the attorneys' fees in this case. It is an interest in removing an obstacle to the continuing availability to state attorney generals' offices of the resources of public interest and other nongovernmental groups in defending the constitutionality of state statutes.

The district court's assertion that "a § 1988 award of attorneys' fees is not tied to actions under color of state law" (App. A-4) ignores the language of the statute. Section 1988 may not be tied to state action, but it is tied to specifically designated statutory provisions. The only one of those provisions that is even arguably applicable is section 1983, which is tied to state action. Congress linked attorneys' fee awards to

specified statutory provisions. This linkage necessarily conditions those awards on compliance with the requirements of the applicable substantive statutes.

The district court observed that Title 42 sections other than 1983—notably sections 1982, 1985 and 1986—do not contain the color of state law requirement. This observation is correct and it cuts squarely against the court's holding. The absence of a state action requirement in three sections does not eliminate the existence of that requirement in a fourth. The fact that Congress included a state action limitation in some civil rights sections but not in others demonstrates that Congress knew the difference. It underscores the congressional intent to limit one of those sections, 1983, to cases involving deprivations under color of state law. It also underscores the fact that by tying section 1988 to designated substantive provisions, Congress intended to limit attorneys' fees to cases that fall within the substantive boundaries of the designated sections.

The district court may be saying that the reach of section 1988 is not tied to any substantive provision of the designated sections, and that its applicability to sections 1982, 1985 and 1986 actions shows that it is not limited to state-sponsored deprivations. If this is the district court's view, it is equally unsound. If civil rights legislation over the last century shows anything, it shows that Congress knows well the difference between private and governmental conduct. Manifestly, therefore, if Congress had intended to make attorneys' fees applicable to all civil rights suits regardless of whether the deprivation was under color of state law, Congress would have said so. Instead, section 1988 is

expressly linked to specifically identified statutory provisions thereby incorporating into section 1988 the substantive distinctions drawn by those provisions. Accordingly, attorneys' fees in a section 1983 suit can be awarded only against those who act under color of state law.

The district court's alternative theory is that upon intervention, the intervenors became the alter egos of the State. There is no foundation in law or policy for this view. The intervenors are not state officials. Their intervention performed a valuable service to the State of Arizona, but they did not intervene because of a generalized citizen interest in good government. They intervened to protect their own interest, which happened to coincide with that of the State. Neither from the State's viewpoint, nor their own, did they come into this litigation as the alter egos of the State. There are many implications—aside from attorneys' fees—from a holding that purely private parties who intervene in government litigation solely for the purpose of protecting their own interest thereby become alter egos of the state. The district court's ruling to this effect is unique. The issue—and the ramifications of the district court's holding—are too substantial for the district court's unique view to be the first and final word.

There are two fundamental approaches that can be taken to the interpretation of this important new federal statute, section 1988. One is all-encompassing and inflexible: the prevailing party benefits from the statute in any case brought under one of the designated sections, regardless of who the parties are, regardless of the language of the applicable substantive section,

and regardless of the relationships of the parties to the litigation. The other approach would take into account the individual differences in the requirements of the substantive sections in light of the policies of those sections and also the policies of section 1988. The first approach is the one adopted by the district court: the prevailing party in a Title 42 civil rights suit may always recover attorneys' fees regardless of who has to pay them. Under the district court's approach, therefore, if the appellants succeed in reversing the district court's holding in No. 78-225, they would be entitled to recover attorneys' fees from the appellees. Indeed, the district court stated that "[h]ad the intervenors been successful in the defense of the action, it is likely that they would have had the right to recover attorneys' fees under § 1988 as the prevailing party." (App. A-7, A-8.) As appealing as this prospect is, we submit that it does not accord with congressional intent, as manifest by the linkage between section 1988 and the designated substantive provisions.

The liability of private intervenors under section 1988 is an issue of first impression involving an important federal statute. Beyond any doubt it is substantial.

3. There Are Strong Policy Reasons for Interpreting Section 1988 Not to Allow Recovery of Attorneys' Fees Against Intervenors.

Every state has an interest in vindicating the policies enacted into law by its legislature. The responsibility for this vindication is vested in the state

attorney general, whose lawyering resources for this and other duties are scarce.

In many cases, there are non-governmental persons and organizations whose interests in upholding statutory validity overlap those of the state to such an extent that they are willing to bear rather substantial legal costs involved in defending the state law. The state still participates, but at a lesser cost because the burden is shared. This sensible arrangement serves the interests of all concerned. Opportunity is provided for parties with public interests to pursue those interests, and the state can more effectively allocate its scarce litigating resources.

The district court has needlessly and substantially inflated the cost of this salutary arrangement. The district court's holding will require future intervenors on the side of the state to consider not only their own legal expenses, but also the risk that they will have to pay the attorneys' fees of the state's opponents.

More is involved than economics and governmental efficiency and convenience. In cases such as this, intervenors are exercising First Amendment rights. Participation in this kind of litigation is a protected form of political expression. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Buckley v. Valeo*, 424 U.S. 1 (1976); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963). In *California Motor Transport Co.*, this Court observed:

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors. 404 U.S. at 510-11.

The First Amendment moorings of public interest advocacy do not depend on whether the advocate is successful in the particular case. The First Amendment guarantees the right to petition, not the right to win. Applied to the litigation context, as in *California Motor Transport* and *Button*, it is advocacy that is protected. Whether the advocate is ultimately successful or unsuccessful does not diminish the right to advocate. As this Court observed in *Button*:

> [A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. 371 U.S. at 429.

Beyond dispute, awards of attorneys' fees against those who exercise their First Amendment rights and lose will have a chilling effect. Whether that chilling effect rises to the level of a constitutional right, and whether the existence of the constitutional issue should persuade the Court to interpret this statute so as to avoid the constitutional question[4] are matters that should be developed in the merits briefs. For present purposes, it is enough that the issue is substantial.

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[4] *United States v. Vuitch*, 402 U.S. 62 (1971).

CONCLUSION

There will be no need to decide the issues raised by this appeal if the Court rules in the appellants' favor in No. 78-225. Moreover, even if the Court were to note jurisdiction as soon as the appellees file their response to this jurisdictional statement, there probably would not be time to brief the merits of this appeal prior to argument of the main case in January or February.

For these reasons, it may be preferable for the Court to hold this case, pending its decision in No. 78-225. In the alternative, jurisdiction should be noted. The district court's interpretation of this important new federal statute raises novel issues having legal and policy implications that affect every state. Reasonable persons may disagree as to whether the district court erred in deciding these issues the way that it did. There can be no disagreement over whether the issues are substantial.

The Court should either note jurisdiction or hold this appeal pending the decision in No. 78-225.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED FARM WORKERS NATIONAL UNION on behalf of itself and its members, et al.,

Plaintiffs,

vs.

BRUCE BABBITT, Governor of the State of Arizona et al.,

Defendants,

ARIZONA FARM BUREAU FEDERATION, an Arizona corporation, et al.,

Intervenors.

NO. CIV 72-445 PHX CAM

OPINION AND ORDER

Before KILKENNY, Circuit Judge, CRAIG and MUECKE, District Judges.

MUECKE, District Judge:

Plaintiffs filed this action for declaratory and injunctive relief together with an application for a three-judge court under the provisions of 28 U.S.C. § 1343,

42 U.S.C. § 1983, and 28 U.S.C. § 2201, et seq., seeking to have Arizona's Agricultural Employment Relations Act (AERA), A.R.S. §§ 23-1381, et seq., declared unconstitutional.

The Arizona Farm Bureau Federation, the Arizona Grape Growers Association, the Vegetable Growers Association, all being Arizona corporations; and the Yuma Citrus Shipper's Association, an unincorporated association, all sought and were granted intervention in the suit on November 5, 1973. These parties, hereinafter referred to as "intervenors," took an active part in the defense of this suit and had taken the position in requesting intervention that they were essentially real parties in interest.

On April 20, 1978 this Court issued its Opinion and Order and Judgment finding that the AERA is unconstitutional in its entirety, and entered a permanent injunction preventing enforcement of A.R.S. § 23-1381, et seq.

On April 28, 1978 plaintiffs filed their motion for attorneys' fees pursuant to 42 U.S.C. § 1988. The matter has been fully briefed by the parties and orally argued to the Court on two occasions. Having taken the motion under advisement the Court now finds that attorneys' fees should be assessed against defendants and intervenors herein.

There is no question that § 1988 authorizes this Court to award reasonable attorneys' fees as part of the costs to the prevailing party. The dispute here is rather whether those fees may be taxed against the intervenors herein, as well as the defendants where the complaint could not have named the intervenors as

defendants. This is a question of first impression for this court.

It is a well settled proposition of law that an intervenor in a civil action is treated as if he were an original party and has equal standing with the original parties. 7A Wright & Miller, *Federal Practice and Procedure*, § 1920, P. 611. Case law has been consistent in following this maxim and, as the Tenth Circuit said in *Galbreath v. Metropolitan Trust Co. of California*, 134 F.2d 569, 570 (10th Cir., 1943):

> One who intervenes in a suit in equity thereby becomes a party to the suit, and is bound by all prior orders and adjudications of fact and law as though he had been a party from the commencement of the suit.

Intervenors do not dispute the law with respect to the standing of intervenors in a suit. Nor do they contest the fact that in certain circumstances attorneys' fees can be awarded against intervenors. This is evident from an award of fees against legislative intervenors in *Sims v. Amos*, 340 F.Supp. 691, aff'd 409 U.S. 942 (N.D. Ala., 1972).

Intervenors do argue, however, that since they could not have been named as defendants under § 1983 in the original complaint due to the fact that they were not acting under color of state law, they are not liable for attorneys' fees under § 1988.

In analyzing this argument we must first look to the wording of § 1988 itself:

> In any action or proceeding to enforce a provisions of sections 1981, 1982, 1983, 1985, and 1986 of this

> title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fee as part of the costs.

First we note that § 1988 makes no mention of "color of state law." It is apparent that a § 1988 award of attorneys' fees is not tied to actions under color of state law. The section allows the award of fees in actions arising under §§ 1985 and 1986. *Griffin v. Breckenridge*, 403 U.S. 88, (1971).

Furthermore, color of law is not an element in actions brought under § 1982. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Thus attorneys' fees have been assessed against private parties under § 1988. *Wharton v. Knefel*, 562 F.2d 550 (8th Cir. 1977). Therefore, from the express wording of § 1988 itself, it is evident that attorneys' fees may be awarded against persons who did not act under color of state law.

Furthermore, § 1988 says that the attorneys' fees may be awarded "as part of the costs." Costs may be assessed against intervenors, *First National Bank of Atlanta v. Southern Cotton Oil Co.*, 86 F.2d 33 (5th Cir., 1936) and, thus, § 1988's wording "as part of the costs" indicates a Congressional intent that costs and attorneys' fees be treated the same. Therefore, if costs can be assessed against intervenors, attorneys' fees can likewise be assessed against them.

In interpreting Congressional intent on this issue the Court also looks to Senate Report No. 94-1011, accompanying the Fees Awards Act of 1976. In that Report, the Senate cited *Sims v. Amos*, supra., with approval. It is true that in *Sims* the intervenors had acted under color of state law; however, the Senate report did nothing, either in the Report or in § 1988, to distin-

guish between intervenors acting under color of law or otherwise. As discussed supra., § 1988 does specifically allow attorneys' fees in some cases in which there was no color of law. Thus, this Court does not agree with intervenors that the distinction in *Sims* (that the intervenors there did act under color of law) is crucial. Because § 1988 allows for assessment of attorneys' fees against persons not acting under color of law (§§ 1982, 1985 and 1986), and because the Senate Report cited *Sims* with approval, it follows that Congress intended that attorneys' fees may be assessed against intervenors who did not act under color of law.

Defendants have argued that the Court's ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1973) precludes an award of attorneys' fees against intervenors here. There the Court held that federal courts could not award attorneys' fees without the existence of Congressional authority to do so. Intervenors argue that there is no Congressional authority for an award against intervenors and, therefore, under *Alyeska* no such award can be made.

Intervenor's position would be correct if, in fact, there was no Congressional authority for an assessment against intervenors here. However, as discussed above, there is such authority—§ 1988. § 1988 does not address the question of who will pay the attorneys' fees and costs. Rather it is worded in terms of who may receive the fees—the prevailing party. Thus it is for the Court to interpret the section and determine who Congress intended to pay the fees and costs. As discussed supra., since attorneys' fees may be assessed against intervenors (*Sims*, supra.) and since attorneys' fees may be assessed against persons who did not act

under color of law (§§ 1982, 1985 and 1986), it follows that attorneys' fees may be assessed against intervenors who did not act under color of law. Thus, there is Congressional authority for the assessment of fees in this situation as required by *Alyeska*.

The Court is well aware of the fact that state action is a requirement in actions under 42 U.S.C. § 1983. Intervenors emphasize that they could not have been sued under § 1983 because they were not acting under color of state law. However, this does not preclude an assessment of attorneys' fees against intervenors because § 1988 is the section under which the fees would be assessed, not § 1983, and state action is not an element of § 1988 (as is evidenced by the preceding discussion of the inclusion in § 1988 of §§ 1982, 1985 and 1986.

It could be argued that § 1983 limits § 1988 and, therefore, because this action was brought pursuant to § 1983, state action is necessary in order to award attorneys' fees. However, as the civil rights statutes are designed to be remedial in nature and, therefore, should be liberally construed, §§ 1983 and 1988 should be read together and § 1983 should not be read to limit § 1988. *Green v. Dumke*, 480 F.2d 624 (9th Cir. 1973).

There also is some question raised concerning the propriety of assessing attorneys' fees against state officials acting in their official capacity. While there is a split among the circuits on this issue, the Ninth Circuit has specifically held that such an assessment is not proscribed by the Eleventh Amendment. *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974).

Finally, it should be emphasized that the intervenors in this suit took an active part in the defense of plaintiff's claims, and were allowed to intervene pursuant to Federal Rules of Civil Procedure, Rule 24(a), for the reason that intervenors alleged that this lawsuit would have a direct and pecuniary effect upon their interest and, if denied the opportunity to intervene, they would be deprived of the benefits of the AERA without the opportunity to perfect an appeal or to defend their interests. Intervenors were, therefore, more than casually interested persons. Rather, they were a driving force, if not the main force, in the defense of this suit, as they had substantial interests to protect. Moreover, intervenors would not have been permitted to intervene if they were not financially and otherwise interested in upholding the constitutionality of the state law and, that after intervention they became alter egos of the State of Arizona and were acting under color of state law in all of their efforts to uphold the constitutionality of the legislation and seek enforcement of that legislation. For this additional reason, it is not necessarily determinative of the issue herein concerning payment of plaintiffs' attorneys' fees as to whether or not intervenors were acting under color of state law.

Since the intervenors were a real party in interest they stood to gain if they were successful in defense of this suit. They were allowed to participate in the action with the full rights of a party and they, therefore, must also bear the burdens which come with the judgment of the court. Had the intervenors been successful in the defense of the action, it is likely that they would have had the right to recover attorneys' fees under

§ 1988 as the prevailing party. In turn, they should share the expenses attendant with having been unsuccessful.

Having found that attorneys' fees should be assessed against defendants and intervenors, the only issue remaining is the amount of those fees. The Court has held an evidentiary hearing at which plaintiffs' attorneys, Michael W. L. McCrory and James Rutkowski, were questioned extensively and presented evidence in support of their affidavits on the question of the amount of time spent by plaintiffs' attorneys in prosecuting this action. The Court believes that plaintiffs' attorneys have substantiated their time claims and there is reason to believe that plaintiffs' attorneys have spent even more time than they have so stated.

Plaintiffs have requested the Court to use the figure of $50 per hour in calculating the amount of fees to be awarded. In considering whether to grant this request, the Court has taken into account the testimony of plaintiffs' counsel that both counsel received a monthly fixed retainer, and were not paid on an hourly basis for their legal work in this case. The retainers they were paid fall considerably below the $50 hourly rate requested. Additionally, at least one of the attorneys, Michael W. L. McCrory, was inexperienced in law when he first began to work on this case.

On the other hand, the questions presented were particularly novel and difficult questions. The case took up a large bulk of the attorneys' time during cer-

tain portions of the prosecution of this case, and the attorneys were totally successful in obtaining the result they desired.

It should also be noted that plaintiffs' attorneys have testified that the fees recovered will go to the United Farm Workers National Union, and will not be used to enrich plaintiffs' attorneys. This procedure was viewed favorably by the Ninth Circuit in *Brandenburger v. Thompson,* 494 F.2d 885 (9th Cir. 1974).

When all these factors are considered in the context of this particular litigation, we find that the reasonable hourly rate that should be paid plaintiffs' counsel is $30 per hour. Plaintiffs' counsel have presented testimony and evidence to substantiate a total of 1,499 hours spent by them in this action. At the rate of $30 per hour, the total amount of attorneys' fees to be awarded plaintiffs' counsel is $44,970.00.

IT IS ORDERED that plaintiffs' motion for attorneys' fees is granted and the amount of $44,970.00 is assessed against the defendants and intervenors herein for the payment of said fees.

DATED this 12th day of September, 1978.

United States Circuit Judge

United States District Judge

United States District Judge

APPENDIX B

FILED

SEP 12 1978

W. J. Fürstenau, Clerk
United States District Court
For The District Of Arizona

BY _____ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

United Farm Workers National Union on behalf of itself and its members, et al., *Plaintiffs,* vs. Bruce Babbitt, Governor of the State of Arizona et al., *Defendants,* Arizona Farm Bureau Federation, an Arizona Corporation, et al., *Intervenors.*	No. CIV 72-445 PHX - CAM JUDGMENT

Plaintiffs having filed their motions for attorneys' fees pursuant to 42 U.S.C. § 1988, and this matter having been fully briefed by the parties and orally argued to the Court, and the Court having duly con-

sidered all the matters presented by the parties, and having entered an opinion and order herein, and having stated the reasons for this judgment,

IT IS ORDERED that plaintiffs' motion for attorneys' fees shall be granted and that defendants and intervenors herein shall pay to the plaintiffs, the sum of Forty-four Thousand, Nine Hundred Seventy Dollars ($44,970.00) for said attorneys' fees, with interest thereon until paid.

DATED this 12 day of Sept., 1978.

United States Circuit Judge

United States District Judge

United States District Judge

JOHN A. LASOTA, JR.
The Attorney General
RICHMOND K. TURNER
Attorneys for Defendants

Jon L. Kyl
JENNINGS, STROUSS & SALMON
Attorneys for Intervenors

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

UNITED FARM WORKERS NATIONAL UNION on behalf of itself and its members, et al., *Plaintiffs* vs. BRUCE BABBITT, Governor of the State of Arizona, et al., *Defendants,* ARIZONA FARM BUREAU FEDERATION, an Arizona corporation, et al., *Intervenors.*	No. CIV 72-445 NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Defendants, Bruce Babbitt, Governor of the State of Arizona; Jack LaSota, Jr., Attorney General of the State of Arizona; Bart Fleming, Treasurer of the State of Arizona; Raymond Long, Finance Commissioner of the State of Arizona; Gene Blake, William S. Boice, Jack Montgomery, Keith Walton, Jack McManus, and Milton G.

Sanders, individually and as members of the Arizona Agricultural Relations Board; and Theresa Bond, in her capacity as Executive Secretary of the[1] Arizona Farm Bureau Federation, an Arizona corporation; the Agricultural Employment Relations Board; and the Intervenors, the Arizona Farm Bureau Federation, an Arizona corporation; the Arizona Grape Growers Association, an Arizona corporation; the Vegetable Growers Association, an Arizona corporation; and the Yuma Citrus Shippers' Association, an unincorporated association, hereby appeal to the Supreme Court of the United States from the Judgment granting plaintiffs' motion for attorneys' fees entered in this action on the 12th day of September, 1978.

This appeal is taken pursuant to 28 U.S.C. § 1253.

DATED this 10th day of October, 1978.

Respectfully submitted,

JOHN A. LASOTA, JR.
The Attorney General

By _____
Assistant Attorney General
Attorney for Defendants

JENNINGS, STROUSS & SALMON

By _____
Charles E. Jones
Jon L. Kyl
John B. Weldon, Jr.
Attorneys for Intervenors

[1] Due to an inadvertent typographical error the following line was omitted from the Notice of Appeal: "Agricultural Employment Relations Board; and the Intervenors, the Arizona".

CERTIFICATE OF SERVICE

I, John A. LaSota, Jr., caused to be served a copy of the Notice of Appeal upon counsel for the Plaintiffs, as required by Rule 33 of the U.S. Supreme Court rules, by depositing a copy of said Notice of Appeal in the United States Post Office with first class postage prepaid and addressed to counsel of record for the Plaintiffs at:

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JOHN A. LASOTA, JR.
The Attorney General

By _____
Assistant Attorney General
Attorney for Defendants

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-931

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
Defendant-Appellants,

AND

ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor Appellants,

versus

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Arizona

MOTION TO AFFIRM

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Constitutions

Rules

Statutes

Texts

Other Authorities

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-931

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
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AND

ARIZONA FARM BUREAU FEDERATION,
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Intervenor Appellants,

versus

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Arizona

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court, Appellees move that the final judgment of the three-judge District Court awarding attorneys' fees to Appellees be affirmed for the reasons that the questions raised in the Jurisdictional Statement are so unsubstantial as not to need further argument and that the decision below is so plainly correct as not to warrant further review by this Court.

OPINION BELOW

The opinion and judgment of the District Court (September 12, 1978) awarded attorneys' fees to Appellees pursuant to 42 U.S.C. § 1988. They are reproduced in the Appendix to the Jurisdictional Statement, pp. A-1 through B-2.

QUESTIONS PRESENTED

(1) Did the District Court properly exercise its discretion under 42 U.S.C. § 1988 when it awarded attorneys' fees to Appellees who prevailed in a 42 U.S.C. § 1983 action against state officials who had both defended and enforced an unconstitutional statute against the Appellees for over five years?

(2) Did the Court properly award attorneys' fees under 42 U.S.C. § 1988 against parties who had intervened as full parties in a proper 42 U.S.C. § 1983 action, were responsible for most of the Appellees' litigation costs and did not prevail in the lawsuit?

ARGUMENT

The State of Arizona and intervening growers' associations propose such a narrow and distorted reading of the Civil Rights Attorneys' Fees Awards Act of 1976[1] that it should be summarily rejected. Their proposed application of this Act entirely ignores not only the express language of the statute but also its clear legislative history.[2] The appellants attempt to turn both on their heads.

[1] 42 U.S.C. 1988 as amended Pub. L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641.

[2] Senate Report No. 94-1011, 1976 U.S. Code Cong. and Adm. News, p. 5908 et seq.

Never do the State and growers argue that it was improper for the District Court to award the Plaintiff-Appellees attorneys' fees under 42 U.S.C. § 1988. Rather they claim it was improper to assess those fees against *them*, the only parties against whom the fees could be assessed. In effect they are proposing that Congress through the Civil Rights Attorneys' Fees Awards Act may have created a remedy, but it is a remedy that the Courts cannot enforce. It takes little examination to determine that their position is both unsubstantial and unsupportable.

A. The Attorneys' Fees Award Against State Officials Is Clearly Proper.

The 1976 Amendment to 42 U.S.C. § 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fee as part of the costs.

There can be no question that this Amendment applies to the present case and that it empowers the District Court to enter an attorneys' fee award against the various defendant state officials.

This action was originally filed and has been prosecuted throughout under 42 U.S.C. § 1983, alleging that the Arizona Agricultural Employment Relations Act (AERA) A.R.S. § 23-1381 et seq., both on its face and in its application violated numerous rights guaranteed under the First and Fourteenth Amendments. Named as defendants were the respective state officials who were responsible for enforce-

ment of the AERA and whose offices had in fact enforced the Act over a five year period. Among those officials named are the Governor of Arizona who appoints the members of the Agricultural Employment Relations Board and the General Counsel of that Board, the Attorney General of Arizona to whom the Board's General Counsel who prosecutes the Act is responsible, and the members of the Board who are ultimately responsible for all administrative enforcement and decisions under the AERA.

On April 20, 1978, after five years of litigation—and a corresponding five years of enforcement of the AERA against the Appellees by the Board, its General Counsel and private parties[3]—a three-judge panel granted in its entirety the relief sought by the Appellees when it ruled that the AERA was unconstitutional and enjoined its enforcement. Appellees' subsequent motion for attorneys' fees was granted in part, from which this appeal is taken.

In response to the obvious propriety of the District Court's award the state officials offer only two feeble arguments. They first suggest that the award was improper because the action was filed before the Attorneys' Fees Award Act was passed. Secondly they argue that they did not "act" other than to carry out the duties of their respective offices to enforce the AERA.

In response to the first contention it is clear that Congress intended the Attorneys Fee Award Act to apply not only to cases filed after October, 1976 but also to cases pending at that time. This question has been squarely addressed by the Courts of Appeals in at least four circuits and each time has been decided against the position now taken by the State and intervenors. *Gore v. Turner*, 563 F. 2d 159 (5th Cir. 1977); *Finney v. Hutto*, 548 F. 2d 740 (8th Cir. 1977); *Bond v. Stanton*, 555 F. 2d 172 (7th Cir. 1977); *Stanford Daily v. Zurcher*, 550 F. 2d 464 (9th Cir. 1977), rev'd on other grounds ..... U.S. ....., 98 S. Ct. 1970 (1978). As the Ninth Circuit Court of Appeals held when deciding whether the 1976 Amendment applied to a case filed before its adoption:

> We are not left to speculate whether Congress intended the Act to apply to attorney's fee awards in cases like this one. The Act expressly states that it is applicable to § 1983 actions like the present one (footnote omitted). And the legislative history is crystalline on the point. The House Report accompanying the House version of the same bill states:
>
> > 'In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. Bradley v. Richmond School Board, 416 U.S. 696, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974).' (H.R. Rep. No. 94-1558, 94th Cong. 2d Sess. 4, n.6 (1976).) (*Stanford Daily, supra,* 550 F. 2d at 466).

The State's second contention is equally without merit, i.e. that because this action was primarily an attack on the invalidity of a statute, those officials who merely acted to defend or enforce that statute should not be held liable for attorneys' fees. By advancing this argument the Appellants totally misconstrue the Civil Rights Attorneys Fees Awards Act as a punitive measure whereas its purpose is

[3]See Enforcement Stipulation; A. 79-191, filed in appeal of main case, No. 78-225.

compensatory. Its objective is not to punish persons who may have violated civil rights laws—other remedies serve that end—but rather to encourage persons to enforce those laws by mitigating the expense of litigation.[4] This Court has recognized this distinction in relation to similar attorneys' fees statutes and has made clear that it is the costs to the plaintiffs and not the good or bad faith of the defendants that was Congress' concern in passing such laws. See, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402.

It is beyond dispute that civil rights can be just as effectively denied through passage and enforcement of oppressive and discriminatory statutes as by the grossest misconduct of governmental officials. As shown here, litigation to enjoin enforcement of such statutes can be just as lengthy and expensive as litigation to enjoin conduct. There is absolutely nothing in either 42 U.S.C. § 1988 itself or its legislative history that even suggests support for the State's claim that the prevailing party be compensated for attorneys' costs in one situation but not the other.

The fact is that the federal Courts have often awarded attorneys' fees against state officials after successful challenges to statutes which they were called on to enforce. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) attorneys' fees awared under 1972 Amendments to Title VII of the Civil Rights Act of 1964 against state officials whose duty it was to enforce a statute found in violation of the Equal Protection Clause; *Brandenburger v. Thompson*, 494 F. 2d 885

[4]1976 U.S. Code Cong. and Adm. News, pp. 5910-12.

(9th Cir. 1974) fees awarded against Director of Social Services after successful challenge to welfare residency requirement; *White v. Crowell*, 434 F. Supp. 1119 (W.D. Tenn. 1977) attorneys fees granted against state officials after challenge to reapportionment plan.

In light of the above it is obvious that the State defendants have presented no argument why they are immune from an attorneys' fees award under 42 U.S.C. § 1988 that is substantial enough to warrant review by this Court.

B. The Court's Award Against the Intervening Growers Is Also Proper.

"In any action . . . to enforce a provision of section 1983 . . . the court may in its discretion . . . allow the prevailing party . . . a reasonable attorneys fee as part of the costs." 42 U.S.C. § 1988. In neither this provision nor its accompanying legislative history is there any limitation whatsoever as to which non-prevailing parties such reasonable fees can be assessed against.

There is no dispute that this was an action to enforce 42 U.S.C. § 1983 and that the appellees prevailed. Therefore the District Court under 42 U.S.C. § 1988 may in its discretion properly assess attorneys' fees against any and all non-prevailing parties who are proper parties to the litigation.

At the outset of this litigation the various grower associations voluntarily moved to intervene as parties on the side of the defendants. As they admit, they did so to protect their own economic interest in the continued enforce-

ment of the AERA.[5] They further admit that they took up the "laboring oar" in defense of the AERA, while testimony at the hearing on the issue of attorneys' fees confirmed that it was the vigorous defense advanced by the intervenors that necessitated most of the legal work of the Appellees.

As the District Court found it is well settled that an intervenor in a civil action is treated as if he were an original party and has equal standing with all other parties. *Galbreath v. Metropolitan Trust Co. of California,* 134 F. 2d 569, 560 (10th Cir. 1943); cf. *Ross v. Bernard,* 396 U.S. 531, 542, n.15; 7A Wright and Miller, *Federal Practice and Procedure* § 1920, p. 611. Once they became parties to this action the intervening growers also became subject to all rules regarding assessment of costs and attorneys' fees that applied to all other parties, including § 1988.

Surely the intervenors could not argue, and indeed have not, that they could not be assessed proper costs of the litigation such as filing fees, trial transcripts, deposition costs, etc. Section 42 U.S.C. 1988 expressly designates reasonable attorneys' fees "as part of the costs". There is no reason to treat these costs differently from any others for which the intervenors, as parties, are liable.

Their argument that they were not acting "under color of law" is irrelevant. They made themselves party to a proper § 1983 action which alleged state action by state officials. Ultimately they became non-prevailing parties in that action and as such are liable like all other non-prevailing parties for the assessment of costs.

[5]Jurisdictional Statement, at p. 14.

CONCLUSION

Since the State and growers have failed to advance any substantial reasons why the District Court's award of attorneys' fees should be set aside, Appellees respectfully submit that the judgment awarding those fees should be summarily affirmed. However since the judgment on the merits of the AERA has also been appealed in case No. 78-225 Appellees realize that the attorneys' fees award cannot be so affirmed until this Court makes a final determination that the Appellees are the "prevailing party." For this reason Appellees join in the suggestion of the Appellants that the Court hold this appeal pending the decision in No. 78-225.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-931

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
Defendant Appellants,
AND
ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor Appellants,

versus

UNITED FARM WORKERS NATIONAL UNION,
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Brief *Amici Curiae* of Mountain States Legal Foundation; Southeastern Legal Foundation; Mid-America Legal Foundation; Great Plains Legal Foundation; and Mid-Atlantic Legal Foundation; in Support of Intervenors' Jurisdictional Statement and on the Merits

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

CONSENT FOR FILING

Mountain States Legal Foundation is a nonprofit, independent public interest legal foundation. The Foundation is supported entirely from donations and is dedicated to legal advocacy of values and concepts of individual freedom, the right to private property and the private enterprise system. The Foundation frequently intervenes in lawsuits of widespread public interest, including civil rights litigation, and the constitutional questions relating to those issues. The Foundation's role in future civil rights litigation is directly affected by the outcome of this case.

The Foundation, in its own name and on behalf of other public interest law centers throughout the country similarly affected, including the Southeastern Legal Foundation; the Mid-America Legal Foundation; the Great Plains Legal Foundation; and the Mid-Atlantic Legal Foundation; submit this brief as *amici curiae* in support of the intervenors' Jurisdictional Statement and on the merits.

The plaintiffs, defendants and defendant-intervenors have given written consent for the Foundations herein to file a brief as *amici curiae*. Copies of these written consents have been filed with the clerk.

JURISDICTION AND SIGNIFICANCE

Defendants and intervenors bring this appeal pursuant to 28 U.S.C. §1253.[1] A more detailed explanation of jurisdiction and disposition of this case in the District Court is left for them to make. This brief also intentionally omits an exhaustive discussion of the "state action" issue of 42 U.S.C. §1983[2] explained in the respective jurisdictional statements filed by the defendants and the intervenors.[3] It is obvious, however, that the interpretation of section 1983 as it applies to the Civil Rights Attorneys' Fees Award Act of 1976 (42 U.S.C. §1988)[4] (the substance of the "state action" issue) was pivotal to the entire attorneys' fee question, in the lower court. If this Court agrees with the lower court and concludes that state action is not necessary for an attorneys' fee award under section 1988, as it applies to section 1983, the amici believe that the lower court's assessment of attorneys' fees against intervenors is nonetheless unconstitutional.

[1]The complete text of 28 U.S.C. §1253 (1970) reads:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

[2]The complete text of 42 U.S.C. §1983 (1976) reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[3]Plaintiffs brought this action under section 1983, though *all concede* that intervenors had not acted under color of state law. In essence, the lawsuit is and was intended solely as a facial challenge to the constitutionality of the AERA. There is no "state action" on the part of intervenors to deprive plaintiffs of their civil rights. Consequently, intervenors argue that section 1988, the only conceivable basis for an attorneys' fee award, does not apply to this case because section 1983 does not apply to them.

Mountain States Legal Foundation and the other amici concur in this position and believe that the argument is dispositive of the attorneys' fee issue.

The purpose of this brief is to convince the Court that it should note probable jurisdiction and consider the attorneys' fee issue on the merits because:

1. The legality and propriety of taxing attorneys' fees against intervenors in a civil rights action is, by the lower court's own admission, "a case of first impression." *United Farm Workers National Union, et al., v. Bruce Babbitt, et al.*, No. 72-445 (D. Ariz. 1978) (order granting plaintiffs' Motion for Attorneys' Fees).

[4]42 U.S.C. §1988 (1976) reads in pertinent part:

> . . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

2. The question involves significant deterrents to first amendment freedoms of speech and expression. An affirmation of the lower court's ruling, that intervenors can be held liable under section 1988 for attorneys' fees, even though they had not acted under color of state law, is an impermissible threat to the constitutional rights of public interest groups, like this Foundation, and other interest groups dedicated to courtroom advocacy of civil rights. The well-established rights of such organizations to advocate political viewpoints in court is, by the lower court's decision, placed in jeopardy.

3. The question involves significant issues of public policy. Should the lower court's decision be affirmed, public interest groups would understandably be reticent to intervene in a civil rights action because of the chilling impact of possible liability for counsel fees. Hence, the judiciary in similar cases may not have a full and balanced presentation of competing interests. The voice of many interested organizations and associations will not be heard on matters of widespread public interest.

The adverse impact of the lower court's decision on the freedom of advocacy for public interest groups and their future role in civil rights litigation warrants consideration by this Court of the arguments herein. Amici suggest that the following questions are raised by the Jurisdictional Statement filed by intervenors.

QUESTIONS PRESENTED

1. Does the lower court's assessment of attorneys' fees against the intervenors violate their first amendment rights to freedom of speech?

2. Is the lower court's ruling contrary to law and the philosophy of government, as expressed by the framers of the Constitution, the courts and the Congress?

SUMMARY OF ARGUMENTS

The order of the lower court should be reversed. This can and should be done by holding that state action, *in lawsuits brought under section 1983*, is a prerequisite for an attorneys' fee award under section 1988.

If this Court concludes that state action, in *lawsuits brought under section 1983*, is not a prerequisite for an attorneys' fee award under section 1988, the lower court's order nonetheless violates intervenors' constitutional rights and should be reversed. Recent Supreme Court cases hold that freedom of political expression is protected by the First Amendment to the Constitution against legal impediments. The intervenors' right to assist the State of Arizona in a vigorous defense of the AERA falls within the ambit of these cases and should be protected against the deterrent effect of possible liability for attorneys' fees.

The assessment of attorneys' fees against the intervenors is also contrary to Congressional intent and the philosophy of American government. The framers of the Constitution, the courts and Congress have sought to encourage representation of public interests. Both the courts and Congress have specifically expressed a policy protecting good faith plaintiffs bringing a civil rights action from the possible liability for attorneys' fees, ex-

cept when a suit is brought merely to harass or annoy the defendant. Defendant-intervenors may represent public concerns, as can plaintiffs, and should be afforded the same protection.

ARGUMENT

I.

THE LOWER COURT'S AWARD OF ATTORNEYS' FEES AGAINST INTERVENORS VIOLATES THEIR FIRST AMENDMENT FREEDOMS OF SPEECH.

The scope of first amendment freedoms has in recent years been held to include advocacy of political values in the courts.[5] The most relevant cases analogous to the case at bar are *NAACP v. Button*, 371 U.S. 415 (1963); the follow-up case of *In re Edna Smith Primus*, 436 U.S. 412 (1978), and *California Motor Transportation Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). All three of these cases, and the precedent cases upon which they were decided, speak to the issue of deterrents to freedom of speech and freedom of political advocacy before the judiciary. The common theme to all three cases is that legal impediments to freedom of advocacy in the courts are unconstitutional, except in very narrow circumstances. The facts of each case involve a plaintiff's right of advocacy before the courts, but have equal application to the defendant-intervenors in the case at bar.

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[5]*Sweezy v. New Hampshire*, 354 U.S. 234 (1975); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

In *Button*, the Court struck down a Virginia statute which proscribed the "improper solicitation of any legal or professional business". 371 U.S., at 415. The statute as applied to the plaintiff, NAACP, was, the Court found, a significant deterrent to the association's first amendment freedoms in vigorous advocacy of lawful objectives. Despite an uncontested finding that the NAACP had openly violated the statute, the Court concluded that:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in the country. It is thus a form of political expression. 371 U.S., at 417.

Later in the opinion, the Court articulated the importance and scope of appellant's first amendment freedoms. "These freedoms," wrote the Court, "are delicate and vulnerable, as well as supremely precious in our society. The *threat of sanctions* (emphasis added) may deter their exercise almost as potently as the actual application of sanctions." *Id.* Any regulation of expression and association, the *Button* Court insisted, must be done "only with narrow specificity". Id., at 433. The point of *Button* with respect to the case at bar is that state regulations (such as disciplinary rules) intended to benefit certain groups or promote a state interest are nevertheless unconstitutional if they also deter an individual's freedom of *political expression* before the courts.

In the subsequent decision of *In re Edna Smith Primus, supra*, the Court endorsed the *Button* doctrines explained above and refined their application. In *Primus*, the appellant, an ACLU lawyer, solicited plaintiffs in violation of Disciplinary Rules of the Supreme Court of South Carolina. Appellee, the Board of Commissioners of the Supreme Court of South Carolina, sought to distinguish *Button* by claiming: first, that the ACLU unlike the NAACP is not primarily a "political" organization but "has as one of its primary purposes, the rendition of legal services". 436 U.S., at 427; quoting 233 S.E.2d, at 303; second, "that the ACLU's policy of requesting an award of counsel fees indicated that the organization might benefit financially in the event of successful prosecution of the suit for money damages". *Id.* The *Primus* Court found both distinctions unpersuasive and irrelevant. As to the first, the Court merely reiterated *Button* doctrine that for the ACLU, as for the NAACP, "litigation is not a technique of resolving private differences, it is a form of political expression and political association". 371 U.S., at 429, 431. Neither did the Court entertain "any suggestion that the level of constitutional scrutiny should be lowered because of possible benefit of the ACLU". 436 U.S., at 428. In other words, as applied to this case, the appellant intervenors are entitled to active and meaningful participation in advocating their belief in the constitutionality of the AERA, without the threat of paying for the views of their opponents, irrespective of the possibility of pecuniary gain. The only caveats to that rule are explained in *California Transport v. Trucking Unlimited*, 404 U.S. 508, 515 (1972), and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978). The first

amendment protection of political advocacy does not, under *Trucking Unlimited*, extend to "mere sham(s) to cover what is actually nothing more than an attempt," *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 144 (1961), "by a group of attorneys to evade a valid state rule against solicitation for pecuniary gain". 436 U. S., at 428, n. 20. Neither does the first amendment protect in-person solicitation by lawyers for pecuniary gain. *Ohralik, supra.*

Both exceptions are inapplicable to the case at bar. No one maintains that the intervenors' defense of the AERA was a "sham," and the *Ohralik* exception applies to bad faith lawyers and not good faith intervenors.

Any argument that a possibility of pecuniary gain to the intervenors denies them the protections of *Button* flies in the teeth of policies embraced in *Primus*. The *Primus* Court declared that:

> . . . in a case of this kind there are differences between counsel fees awarded by a court and traditional fee paying arrangements which militate against a presumption that ACLU sponsorship of litigation is motivated by consideration or pecuniary gain rather than by its widely recognized goal of vindicating civil liberties. 436 U.S. 429.

Intervenors in this case, it can be argued, may gain monetarily if the AERA is upheld in the sense that their business interests will be better pro-

tected than if the law is struck down. But advocacy need not be entirely free from economic overtones to be political. Moreover, it should be stressed that intervenors did not seek attorneys' fees. Their singular objective was to assist the State of Arizona in defending the AERA's constitutionality.

Finally, the *Primus* case, speaking in the context of possible exceptions to *Button* emphasizes that attorneys' fees should not be awarded absent specific statutory authorization, or a showing of bad faith in the conduct of litigation. In *Primus*, it was argued that ACLU's traditional plaintiff role in seeking attorneys' fees was a sufficient justification for upholding the South Carolina rule against solicitation and denying the ACLU freedom of expression. The Court disagreed. In the case at bar, the plaintiffs now argue that there is sufficient justification to deny the intervenors freedom of speech. Certainly, plaintiffs cannot always have it their way. If *Button* and *Primus* protect plaintiffs in their free speech rights against legal deterrents, the same holding ought to be extended defendant-intervenors.

II. (A)
THE LOWER COURT'S DECISION TO ASSESS INTERVENORS FOR ATTORNEYS' FEES IS CONTRARY TO THE PHILOSOPHY OF GOVERNMENT EXPRESSED BY THE FRAMERS OF THE CONSTITUTION.

A basic tenet of American political philosophy is that a balanced presentation in issues of widespread public interest promotes the good of society. In drafting the Constitution, the framers specifically designed our system to insure the viability

of that tenet and guard against what James Madison called the "mischief of factions".[6] In Federalist No. 10, Madison wrote that a principal defect in the Articles of Confederation was that "our governments are too unstable, that *the public good is disregarded in conflicts of rival parties* (emphasis added) and that measures are too often decided, not according to the rules of justice, and the rights of a minority party, but by the superior force of an interested and overbearing majority".[7]

Madison's concern was with the entire governmental system. Concededly, Federalist No. 10 is not talking about the role of public interest groups before the judiciary. But the theme of Federalist No. 10 is that government is weakened when factions can control policy absent representation from other groups. The mischief of factions, by which he meant "a number of citizens whether *amounting to a majority or minority* . . . (emphasis added) are united by a common impulse of passion,"[8] is that their militant nature often controls the public policy for a silent majority. Madison saw only two cures for the mischief of factions: The first was to destroy the liberty by which they flourished, which he rejected, and the second was to control their effects by adopting a system to insure that opposing voices are heard.

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[6] *The Federalist No. 10* (J. Madison) at 77 (Mentor, 5th ed. 1961).

[7] *Id.*

[8] *Id.*, at 78.

Though Federalist No. 10 was written to elucidate "the numerous advantages of a well-constructed Union,"[9] its arguments are likewise pertinent here. The role of the judiciary in formulating public policy is recognized by cause-oriented public interest groups. During the past decade more than 100 "public interest" law centers, including Ralph Nader's Public Citizen Litigation Groups, the Environmental Defense Fund, Natural Resources Defense Council, the Sierra Club Legal Defense Fund and the Foundations sponsoring this *amici* brief have been founded. All presume to speak in the best interests of society, though they may conflict in viewpoint. Vital public policy issues are, therefore, often decided by the judiciary; an aggressive plaintiff or defendant, though he or she may represent a narrow viewpoint, can advocate causes affecting public policy often without input from other interested parties. The danger of a fragmented society is then real if the broad public interest is disregarded in conflicts of rival special interest groups.

In this case, if good faith intervenors are made to finance the expression of UFW political beliefs as well as their own, the fragmentation of society (through inconsistent adjudications or adjudications absent interested parties) becomes all the more a relevant concern in future civil rights policy decided by federal courts. By sustaining the lower court's award of attorneys' fees, this Court would ring the death knell to civil rights representation by public interest groups in cases similar to this. The consequences of that to society are far-

[9] *Id.*

reaching. Vast segments of the public, from the poor litigant to the average middle class citizen, would have a weakened voice in the courts.

Similarly, the state efficacy in defending its own laws is undermined. If the state does not defend its laws or for some reason does not have resources available for their vigorous defense, the stability of society is weakened by special interest groups seeking to invalidate its laws. As in this case, intervenors representing large segments of public interest supplemented the efforts of the state, and indeed "were a driving force, if not the main force in defense of this suit, as they had substantial interests to protect". *United Farm Workers National Union, et al., v. Bruce Babbitt, et al., supra.* Certainly, plaintiffs have the right to challenge the AERA, but equally important, and usually overlooked, is the duty of the state to defend its own laws which presumably represent the will of the people. Intervenors, by their vigorous defense of the AERA, assisted the State of Arizona in defending its laws and thereby fulfilled an important role in our society which must be allowed and encouraged.

II. (B)
BOTH THIS COURT AND CONGRESS HAVE SOUGHT TO ENCOURAGE PUBLIC INTEREST REPRESENTATION BY LIMITING ATTORNEYS' FEE AWARDS TO NARROW CIRCUMSTANCES.

Under the traditional American rule, the federal judiciary has refused to award attorneys' fees absent statutory authority. Recent decisions by this Court have refined the rule's application:

In *Christiansburg Garment Co. v. E.E.O.C.*, 434 U. S. 412 (1978), this Court held that under Title VII of the Civil Rights Act of 1964 [42 U.S.C. §2000e - 5(k)] a Federal District Court could in its discretion award attorneys' fees to a prevailing *defendant* only upon a finding that the plaintiffs' action was frivolous, unreasonable, or brought in bad faith. This Court has also held in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) that without specific statutory or contractual authority to the contrary, or a showing of "bad faith," litigants must pay their own way.

As stated in Senate Report No. 94-1011, the purpose of the Civil Rights Attorneys' Fee Award Act of 1976 (42 U.S.C. §1988) was to amend the Civil Rights Act of 1866, Revised Statutes Section 722, in order to:

> . . . give the Federal courts discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts which Congress has passed since 1866. . . .[10]

In passing section 1988, the Congress recognized that "in the large majority of cases, the party or parties seeking to enforce such rights will be the plaintiffs or plaintiff-intervenors. However, in the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants and/or the defendant-intervenors."[11] This is the

[10]S. Rep. No. 94-1011, 94th Cong., 2nd Sess. 2, *reprinted in* [1976] U. S. Code Cong. and Ad. News 5909, 5909.

[11]*Id.*, at 5912.

only mention of defendant-intervenors in the history of the Act, and nowhere does it deal directly with the *liability* of defendant-intervenors for attorneys' fee awards.

It should be stressed, however, that section 1988 is permissive, unlike certain other federal statutes which provide for mandatory recovery of attorneys' fees.[12] That Congress left the awarding of attorneys' fees under this statute to the court's discretion implies that it did not wish the courts to impose an automatic award. According to the House Report, Congress intended the courts to exercise that discretion so that it would "not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harrassment purposes".[13]

The policy articulated by the Congress and the protections to public interest plaintiffs afforded by the courts demand an analogous standard for defendant-intervenors. Thereby, a party who intervenes in good faith to promote a relevant viewpoint on the defendant's side would be protected from the crushing burden of additional attorneys' fees. The deterrent effect upon future public interest actions would be avoided for all but clearly unwarranted intervention. Prospective good faith intervenors would be protected as well as prospective plaintiffs in their freedom of expression before the courts.

[12]*See, e.g.*, 15 U.S.C. §15 (mandatory recovery in treble damages anti-trust actions); 29 U.S.C. §216(b) (recovery under the Fair Labor Standards Act); 15 U.S.C. §1640(a) (Truth in Lending Act).

[13]H. R. Rep. No. 94-1558, 94th Cong., 2nd Sess. 6-7 (1976).

CONCLUSION

The judgment of the lower court is in error because it taxes attorneys' fees against intervenors under authority of section 1988 when, in fact, they were not guilty of any prerequisite state action under section 1983.

Independent of this statutory argument, the lower court's decision violates the intervenors' protected freedom of speech and discourages public interest groups from contributing to decisions of public policy. Both the courts and the Congress have sought to encourage good faith representation of relevant public interests.

For these reasons, the judgment of the lower court, with respect to the attorneys' fee award against intervenors, should be reversed.

Respectfully submitted,

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